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E. ROBERT SEAVER

IN THE

Supreme Court of The United States

No. 69-5003

WILLIAM HENRY FURMAN,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF AMICUS CURIAE

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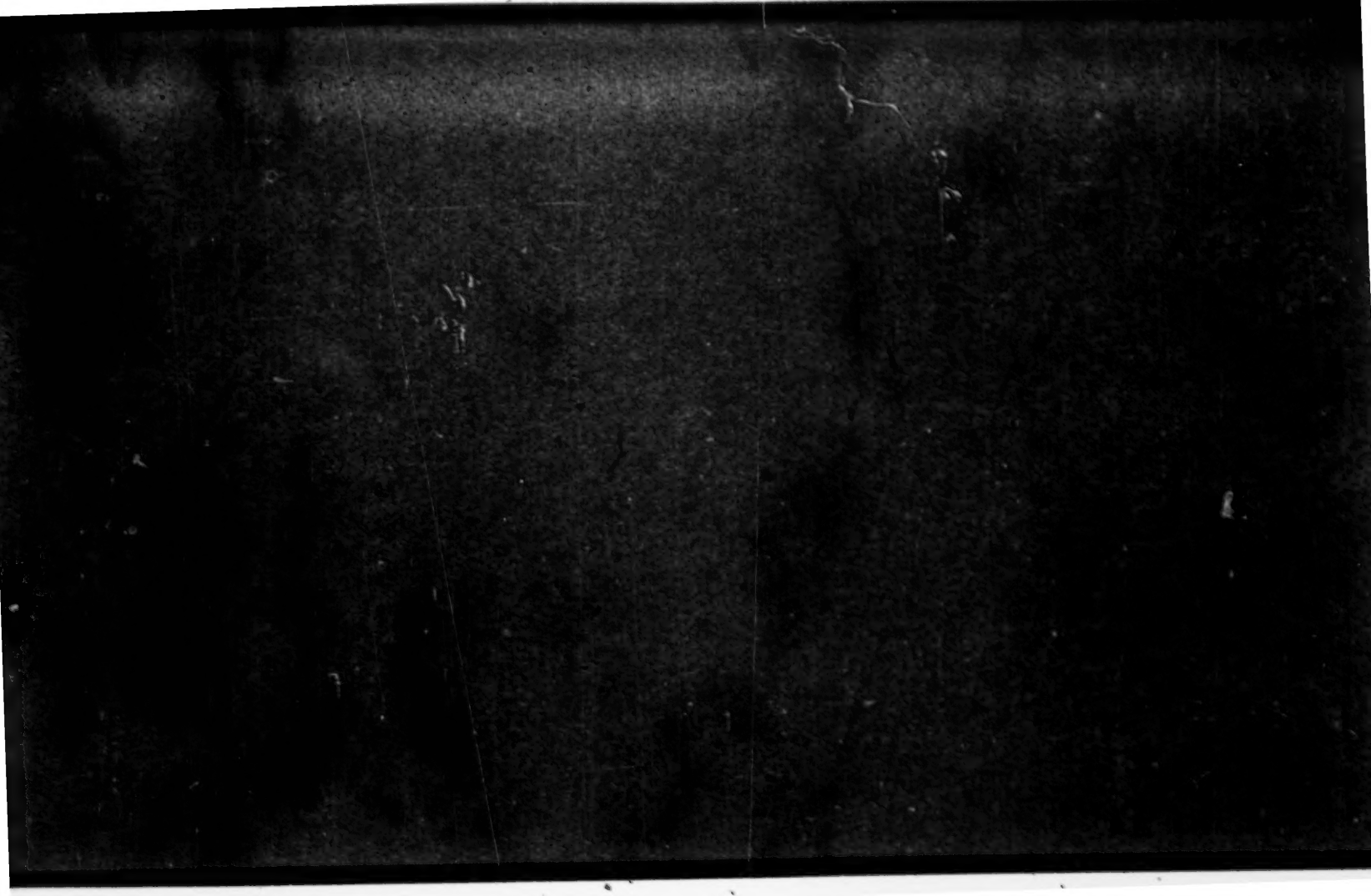

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The interest of the State of Indiana is in the preservation of the Indiana Constitution and statutes that are directly analogous to those in question. In the Bill of Rights of the Indiana Constitution, at Section 16, it is provided that:

> "Excessive bail shall not be required. Excessive fines shall not be imposed. *Cruel and unusual punishments*

shall not be inflicted. All penalties shall be proportioned to the nature of the offense." (My emphasis.)

Indiana statutes, IC 1971, 35-1-46-9, as found in Burns' (1956 Repl.) Section 9-2236 et. seq. provide for the death penalty by electrocution.

QUESTION PRESENTED FOR REVIEW

Whether Georgia's statute allowing the death penalty for a conviction of first degree murder constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

The Statement of the Case contained in the Brief of Respondent is accurate and concise and is referred to here.

SUMMARY OF THE ARGUMENT

Capital punishment is not "cruel and unusual punishment" in violation of the Eighth Amendment. The framers of the Bill of Rights had in mind the abolishment of other penalties such as those attributed to the infamous English Court of Star Chamber.

The Fifth Amendment, which was ratified at the same time as the Eighth Amendment, only requires that due process be observed in assessing the ultimate penalty. The intent of the framers is to be found in the explicit language of the Fifth Amendment and not in the nebulous "cruel and unusual punishment" phrase contained in the Eighth Amendment, which has until this day defied precise definition.

Petitioners argue that the "cruel and unusual punishment" clause should be viewed from the "evolving standards of decency that mark the progress of a maturing society."[1] In their view, a majority of the population is opposed to capital punishment and, because of this, the penalty is no longer acceptable. Yet at the same time, they argue that neither legislation nor constitutional amendment is an effective means for changing the law because public feeling is not strong enough to compel change, either in Congress or the state legislatures. By this reasoning, they attempt to justify change in the law through judicial action rather than by proper legislation or constitutional amendment.

Capital punishment *is* a deterrent to future crime. It is argued by opponents that statistical evidence refutes this reasonable conclusion. However, the statistics which form the basis of the petitioner's argument omit all the essential subjective variables and are therefore of limited value. This issue is far too important to be decided exclusively by bare statistics.

Capital punishment was contemplated by the framers of the Bill of Rights and the concept was re-affirmed in 1869 when the authors of the Fourteenth Amendment borrowed the explicit language of the Fifth Amendment which allows the death penalty provided due process has been observed.

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1 Trop v. Dulles (1958), 356 U.S. 86, 101

ARGUMENT

The issue involves a question of whether capital punishment is in violation of the "cruel and unusual punishment" clause of the U. S. Constitution, Eighth Amendment. This amendment provides that:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fifth Amendment of the Constitution of the United States included capital punishment in its scope. Historically the Fifth and Eighth Amendments were ratified together as part of the Bill of Rights. The Fifth Amendment states in part, that:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

This same language appears again in the Fourteenth Amendment of the United States Constitution, which states, in part, that:

> ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; . . ."[2]

The Eighth Amendment was adopted as part of the Bill of Rights in 1791. This wording initially appeared in the Act of Parliament of 1688,[3] to abolish the atrocities of the English Court of the Star Chamber. In that "judicial" body, confessions were extracted in open court

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2 Robinson v. California (1962), 370 US 660

3 William and Mary, Sess. 2, ch. 2 at 192 (1869)

through various diabolical means, and the punishments that were meted out included the loss of ears for perjurers, face branding and nose splitting for forgers and conspirators, and whipping for those guilty of "unnatural" offenses.[4] The adoption of the Eighth Amendment verbatim from the 1688 Act of Parliament, with no reported controversy, would suggest that it was intended to apply to the kinds of medieval torture described above.[5]

Courts which have heard questions of "cruel and unusual punishment" have refused to follow the inflexible theory that cruel and unusual punishment must be determined by the same standards that were in effect at the time of the drafting of the Bill of Rights. They have continually applied a less rigid standard of "a developing and maturing society." Opponents of capital punishment have ignored this judicial test and have erroneously stated that our society has progressed to the point that capital punishment is no longer acceptable. Chief Justice Warren, in the majority opinion in *Trop v. Dulles* (1958), 356 U.S. 86, 100, explained that:

> "The exact scope of the constitutional phrase 'cruel and unusual' has not been detailed by this court. But the basic policy reflected in these words is firmly established in the Anglo-American tradition of criminal justice. The phrase in our Constitution was taken directly from the English Declaration of Rights of 1688, and the principle it represents can be traced back to the Magna Carta. The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the state has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards."

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4 Parry, "The History of Torture in England," 9 (1934)

5 Sherman, ".... Nor Cruel and Unusual Punishments Inflicted," 14 Crime and Delinquency 73, (1968)

Indeed, in the same decision, *Trop v. Dulles, supra,* Chief Justice Warren expressly recognized the necessity of the retention of capital punishment where the offense requires its imposition. He stated that:

> "*Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime,* but any technique outside the bounds of these traditional penalties is constitutionally suspect . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." (My emphasis.)

It must be emphasized that although Chief Justice Warren recognized the flexible standard of contemporary society, he did not find that capital punishment was unconstitutional when the facts of the case showed that the death penalty was proportionate to the severity of the crime. In the case presently being considered, the death penalty was imposed as a just and proportionate punishment for a cold-blooded and wanton murder.

Opponents have never presented sufficient evidence to show that opposition to the death penalty is, indeed, as widespread as they would have us believe. Chief Justice Warren, in *Trop v. Dulles, supra,* at 99, further stated that:

> "Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, *it cannot be said to violate the constitutional concept of cruelty.*" (My emphasis.)

At this point, opponents introduce numerous polls to show that a certain percent of the population is opposed

to capital punishment. Without going into the myriad of problems inherent in these polls and the accuracy of their findings, one point remains a mystery. If the anticapital punishment advocates are so sure of public opinion, why are they not willing to submit this question to the voters in a referendum; or why do they feel that state and federal legislators are not sufficiently in tune to realize the alleged feeling against this punishment? The fallacy in the reasoning of the opponents is quite obvious. They continually talk of the 'great movement' to abolish the death penalty. They say that since the citizens of the United States are against this punishment, it no longer meets the "standards of decency that mark the progress of a maturing society." At the same time, they state that this change must be initiated through the courts as public opinion is not sufficiently strong to influence this change through legislation. Obviously, one of their conclusions is erroneous, and they are asking the Court to usurp this legislative function. The fixing of penalties for crimes has always been a legislative function, and courts should intervene only when the legislative discretion is violated.

In *Bailey v. U.S.* (1934), 74 F. 2d 451, the opinion of the 10th Circuit Court of Appeals stated that:

> "The fixing of penalties for crimes is a legislative function. What constitutes an adequate penalty is a matter of legislative judgment and discretion, and the courts will not intervene therewith unless the penalty prescribed is clearly and manifestly cruel and unusual."

(A reading of cases in this area fails to develop an adequate definition of "cruel and unusual." Also, the courts which have considered whether there is a difference be-

tween "cruel" and "unusual" have not arrived at a precise distinction between the two terms.)

The dissenting opinion of Mr. Justice White in *Weems v. U.S.* (1910), 217 U.S. 349, stated that:

> "This interpretation curtails the legislative power of Congress to define and punish crime by asserting a right of judicial supervision over the exertion of that power, in disregard of the distinction between the legislative and judicial departments of Government."

In *Adams v. State* (1971), 271 NE 2d 425, the Indiana Supreme Court viewed its function as follows:

> "We feel the question in our jurisdiction hardly needs to be discussed, since precedent and authority have determined the question against the position taken by the appellant; and although a judge may personally not approve the punishment fixed by the legislature for some crimes, it is not the judge's privilege, because he does not agree with the legislative policy, to attempt to nullify legislative enactment. We would be violating our oaths and stepping outside our jurisdictional function to do so."

The entire argument of the desirability of legislative change or judicial decision was summarized in 79 Harvard Law Review 635, 639 (1966):

> "In light of these difficulties and the uniform authority sustaining capital punishment, to hold that it is a method of punishment wholly prohibited by the eighth amendment would be to confuse possible legislative desirability with constitutional requirements."

The desire of some advocates for social change should not be confused with the desire of the entire nation for a constitutional amendment. How can capital punishment

be abolished by a judicial tribunal, albeit the United States Supreme Court, without, in effect, amending the Fifth and Fourteenth Amendments? Since the death penalty is not cruel and unusual, any change ought to be sought through legislation or by a constitutional amendment.

There are several reasons for the *privacy*, not secrecy, of legal executions in the United States. An execution has a deterrent effect only to the degree that a person contemplating the crime has knowledge of the penalty attached to the crime committed. In this day and age, this knowledge is not acquired by means of public executions. Are the opponents so naive as to think the potential criminal is unaware of the death penalty unless he is reminded by a public execution?

The privacy of executions is evidence that as a developing and maturing society, we are simply insuring the dignity of man. There is no reason to put the families of those sentenced to execution through the traumatic experience of a public display since the deterrent effect is the knowledge that the death penalty is imposed. Any reasonable person dislikes confinement but this attitude does not buttress the conclusion that he is against imprisonment for crime or that he wishes to abolish sentences of incarceration.

It is well to remind ourselves of the purpose of legal punishment itself: "Punishment is ordinarily justified under a utilitarian theory as being necessary for the achievement of a long-range benefit."[6] The long range benefit discussed in relation to punishment is its deterrent effect, which is often defined as the preventive effect

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6 Harvard Law Review, 79:635 (1965-66)

which actual or threatened punishment of offenders has upon potential offenders. This principle has always influenced our penal codes and is largely responsible for the lawful and justified use of capital punishment. Richard M. Gerstein, State Attorney for Dade County, Miami, Florida, stated that:

> "As do many members of our profession, I take the position that deterrence is necessary for the maintenance of the legal system and the preservation of society, as clearly stated by Sir John Salmond:
>
> > 'Punishment is before all things deterrent, and the chief end of the law of crime is to make the evil doer an example and a warning to all who are likeminded with him.' "[7]

The deterrent effect of the death penalty is a vital consideration in discussing the necessity of its retention. The basic question to be considered here is the deterrent effect on potential offenders. In other words, does the knowledge that he may be executed have a discernible influence on the potential murderer's decision to commit the murder or the felony that leads to the murder. It is the contention of a vast majority of prosecutors that the deterrent effect of capital punishment *is* significant. Forgetting for the moment the wealth of evidence available to substantiate its deterrent effect, we should rely more on the practitioner instead of the academic reformer. We should believe the person who deals with the accused murderer in the real-life situation, rather than the person who has analyzed what he would or should have done in a clinical psychological vacuum.

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7 Gerstein, J. Crim. L. 51:252 (1961)

Vital Speeches of the Day recently carried the following pertinent observations from a presentation on law enforcement:

"The propaganda drive to abolish capital punishment appears to be a geared part of a general drive toward leniency in the treatment of criminals in our society. Such leniency has, in my opinion, had undeniable psychological impact on potential murderers, and has contributed to the upward spiral of the crime rate. There is a striking over-all correlation between the recent decline in the use of the death penalty and the rise in violent crime. Such crime has increased by geometric proportions.

In the first three years of the last decade, the number of executions in the United States was by present standards relatively high. Fifty-six persons were executed in 1960; 42 in 1961; and 47 in 1962. During these same three years the number of people who died violently at the hands of criminals actually declined and the murder rate per 100,000 of population also declined.

Beginning in 1963, however, there was a drop in the number of legal executions, and the graph line of violent crime simultaneously began moving up instead of down. In the following years the number of legal executions has decreased dramatically from one year to the next, until in 1968 there was none at all. But each of those years has seen murders increase sharply both in absolute numbers and as a percentage of population.

In 1964, for example, the number of legal executions dropped to 15. Yet the number of violent deaths moved up from 8,500 to 9,250, and the murder rate per 100,000 went up from 4.5 to 4.8. In 1965, the number of legal executions dropped to seven, while the number of violent deaths increased to 9,850, and the murder rate went to 5.1. Similar decreases in legal

executions have occurred in the following years accompanied by similar increases in the murder rate.

In 1968, with no legal executions at all, the total number who died through criminal violence reached 13,650, while the murder rate climbed to 6.8 per 100,000.

The movement in these figures, with murders increasing as the deterrence of the death penalty diminished, confirms the verdict of ordinary logic: That a relaxation in the severity and certainty of punishment leads only to an increase in crime.

These remarks concern the deterrent effect of the death penalty on those who might commit murder but do not. That is a negative phenomenon which can be inferred both from the record and the assessment of common sense. The repeal of the death penalty would not repeal human nature. To these truisms we may add the fact that there are numerous cases on record in which criminals have escaped the capital penalty for previous murders and gone on to commit others . . .

Is a course of action humanitarian which actually encourages a vast and continuing increase in the number of people killed and maimed and otherwise brutalized? There have been many sentimental journeys into the psychological realm of the criminals who are to be executed; I think there should be more sympathetic concern expressed for the thousands of innocent victims of those criminals.

Opponents of the death penalty may rejoice that in 1968 there were 47 fewer murderers executed in this country than was the case in 1962; but, do they say anything of the fact that some 5,150 more innocent persons died by criminal violence in 1968 than was the case in 1962?

In the question of human suffering, this is a staggering loss of more than 5,000 individual innocent lives.

What about the human rights and civil rights of the individual victim? Are not those 5,000 persons entitled to the dignity and sacredness of life? Is that a result of which humanitarians can be proud? I think not.

Only misguided emotionalism, and not facts, dispute the truth that the death penalty is a deterrent to capital crime.

Individuals must be held responsible for their individual actions if a free society is to endure.'"[8]

Additionally, the Royal Commission on Capital Punishment made the following finding in relation to deterrence and the abolition of capital punishment:

"The general conclusion which we reach, after careful review of all the evidence we have been able to obtain as to the deterrent effect of capital punishment, may be stated as follows. *Prima facie the penalty of death is likely to have stronger effect as a deterrent to normal beings than any other form of punishment and there is some evidence (though no convincing statistical evidence) that this is in fact so.*" (My emphasis.)[9]

The statistics used to minimize the deterrent effect of capital punishment categorically omit the essential variables that would have, otherwise, given these statistics some meaning. One of the most glaring omissions from the statistical standpoint is the input of common sense. If the death penalty is no more of a deterrent than life imprisonment, as the opponents would have us believe,

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8 Sendak, Vital Speeches of the Day, Vol. 38, No. 18, page 574, (July 1, 1971)

9 Royal Commission on Capital Punishment, Report 18, note 15 at page 24.

why do convicted murderers exhaust all legal barriers in attempting to get a death sentence commuted to life imprisonment? They want us to believe that at the time just prior to and during the act, the criminal sees no discernible difference between life and death, but upon apprehension, he suddenly feels the importance of life imprisonment. It is the contention of this Amicus Curiae that deductive reasoning leads to the conclusion that in view of the importance of life imprisonment over the death penalty to those who are awaiting execution, this same importance must, either consciously or subconsciously, be in the mind of the potential slayer as he is preparing to perpetrate his crime. It is, therefore, a deterrent.

Further evidence of the unreliable nature of the opponents' statistics on the deterrent effect of the death penalty is that none of their statistics shows the number of persons who were aware that they could be put to death for their act, and for that reason decided not to perpetrate the crime. Their statistics only show the failure, i.e. the persons who were not deterred and actually committed the crime. No one can reduce to cold, impersonal, statistical columns the number of persons who have refrained from murder because of fear of the death penalty. There is no way to gauge this most essential variable. Judge Hyman Barshay had this fact in mind when he made the following observation:

> "The death penalty is a warning, just like a lighthouse throwing its beam out to sea. We hear about the shipwrecks, but we do not hear about the ships

that the lighthouse guides safely on their way. We do not have proof of the number of ships it saves, but we do not tear the lighthouse down."[10]

CONCLUSION

Capital punishment is not in violation of the United States Constitution. Attackers of the death penalty rely on the ambiguous and elusive "cruel and unusual punishment" clause of the Eighth Amendment in the attempt to have it declared unconstitutional. These attackers ignore the explicit language of the contemporaneous Fifth, and Fourteenth, Amendments that recognize capital punishment provided due process is observed.

Those who wish to abolish capital punishment say, without proof, that it is now offensive to the general population. If and when the voice of the people is strongly against capital punishment, their representatives in Congress and the legislature will change the laws and amend the Constitution to abolish it. There have been, to date, twenty-six amendments to the United States Constitution which clearly shows that there is no necessity for the Judiciary to take over that procedure instead of utilizing the prescribed procedures for constitutional amendment.

Opponents of capital punishment document their case with statistics which are intended to show that there is no deterrent effect in the death penalty. But strong statistics also buttress support of capital punishment. Capital punishment is, in fact a deterrent and is not in violation of the United States Constitution.

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10 Sr. Schol., Capital Punishment: Pro and Con. 71:6.

Therefore, the decision of the Georgia Supreme Court upholding the constitutionality of capital punishment for conviction of first degree murder should be affirmed.

Respectfully submitted,

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